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In the Supreme Court of the United States

OCTOBER TERM, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the federal criminal prohibition against the use of a "telecommunications device" to "knowingly * * * make[], create[], or solicit[], and * * * initiate[] the transmission of" any material "which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age," 47 U.S.C. 223(a)(1)(B), is unconstitutional on its face.

2. Whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to send to "a specific person or persons under 18 years of age," any material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(A), is unconstitutional on its face.

3. Whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to "display in a manner available to a person under 18 years of age," any material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(B), is unconstitutional on its face.

4. Whether the federal criminal provisions that forbid a person from knowingly permitting the use of a telecommunications device under such person's control to be used to violate any of the three preceding prohibitions, 47 U.S.C. 223(a)(2) and (d)(2), are unconstitutional on their face.

PARTIES TO THE PROCEEDINGS

Appellants are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. Appellees are the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc., American Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired Ventures LLC, Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Network, L.L.C., National Press Photographers Association, Netcom On-line Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prod-

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-148a) is reported at 929 F. Supp. 824.

JURISDICTION

The judgment of the district court was entered on June 12, 1996. A notice of appeal was filed on July 1, 1996. J.S. App. 162a-164a. On August 19, 1996, Justice Souter extended the time for filing a jurisdictional statement to and including September 29, 1996. The jurisdiction of this Court is invoked under Section 561(b) of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 143, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides that "Congress shall make no law * * *" abridging the freedom of speech." The Fifth Amendment provides that no person shall be "deprived of * * * liberty * * * without due process of law." Section 502 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, appears in the appendix to the jurisdictional statement. J.S. App. 165a-172a.

STATEMENT

This case involves a constitutional challenge to provisions of the Communications Decency Act of 1996 (CDA), that prohibit the use of "telecommunication devices" and "interactive computer services" to disseminate "indecent" or "patently offensive" sexually explicit material to children under 18 years of age. 47 U.S.C. 223(a)(1)(B), 223(a)(2), 223(d). Those restrictions apply to the dissemination of material on the system of interlinked computers known as the "Internet." They also apply to other interactive computer services, such as electronic bulletin boards. Appellees, organizations and individuals who use the Internet, filed suit in the United States District Court for the Eastern District of Pennsylvania, asserting that the CDA's restrictions on indecent and patently offensive communications violate the First and Fifth Amendments of the Constitution. Focusing on the CDA's impact on the Internet, a three-judge court held that the CDA's restrictions on indecent and patently offensive communications are unconstitutional on their face, and issued a preliminary injunction against their enforcement. Two of

the three judges concluded that the CDA's restrictions on indecent and patently offensive communications are unconstitutionally vague, in violation of the First and Fifth Amendments. All three judges concluded that the prohibitions are unconstitutionally overbroad, in violation of the First Amendment. Pursuant to Section 561(b) of the CDA, 110 Stat. 143, which authorizes a direct appeal to this Court as of right in such circumstances, the Attorney General and the Department of Justice have appealed from the preliminary injunction.[1]

1. The Internet originated from experimental efforts of the Department of Defense to link defense-related computer systems so that research and communication could continue even if portions of the network were damaged. J.S. App. 14a. Similar networks were subsequently developed to link universities, research facilities, businesses, and individuals around the world. *Id.* at 16a. All of those networks were ultimately linked to one another and became the global network known as the Internet. *Ibid.* As many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999. *Id.* at 13a.

Individuals obtain access to the Internet in two basic ways: Some people use a personal computer with a modem to connect over a telephone line to a

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[1] After the decision in this case, a three-judge court in the United States District Court for the Southern District of New York issued its own preliminary injunction against enforcement of the CDA's restrictions on patently offensive communications. *Shea* v. *Reno*, 930 F. Supp. 916 (1996). The Attorney General has appealed from that preliminary injunction, and the jurisdictional statement in that case is due to be filed by October 14, 1996.

computer network that is linked to the Internet; others use a computer that is directly connected to a computer network that is itself linked to the Internet. J.S. App. 16a-17a. Many entities offer modem and direct connections to the Internet. For example, national commercial online services, such as America Online, charge subscribers a monthly fee for access to the Internet through their own computer networks. *Id.* at 19a. "Internet service providers" also offer access to a computer network that is linked to the Internet. Most of those providers also charge a monthly or hourly fee. *Ibid.* In addition, educational institutions often provide Internet access to students and faculty through computers located on campus, *id.* at 17a, and some businesses provide such access to their employees through office networks, *id.* at 17a-18a.

There are many ways for people to communicate on the Internet. One of the most common ways is through electronic mail (e-mail). Using e-mail, an individual can send an electronic message to one or more specific persons. J.S. App. 21a. People can also use automatic mailing list services (mail exploders) to send messages on a particular topic (such as health care) that are then automatically distributed via e-mail to those who have subscribed to the mailing list. *Id.* at 22a. Information can similarly be exchanged through newsgroups. *Id.* at 22a-23a. Like mail exploder users, newsgroup users ordinarily exchange information on specific topics. Unlike mail exploder users, however, newsgroup users do not have to subscribe in advance; instead, they can obtain access to the information at any time. *Id.* at 23a. Persons can also use the Internet to communicate in "real time." Programs such as "talk" permit one-to-one communication; programs such as "Internet Relay Chat" permit communication among several persons. *Id.* at 24a.

Another way to use the Internet is to search for and retrieve information that is stored on remote computers. J.S. App. 25a. The most well-known method of doing that is by exploring the "World Wide Web." *Id.* at 25a-26a. The Web uses a formatting language known as hypertext markup language (HTML), and programs that browse the Web can display HTML documents containing text, images, and sound. *Ibid.* HTML also permits documents to include "links" to other Internet documents, so that with the click of a computer "mouse," a person can move from one document to another even if the documents are stored on computers in different parts of the world. *Ibid.* Many organizations have "home pages" on the Web that store information about the organization and its activities and that provide links to other Web sites containing related information. *Id.* at 27a.

"Search engines," such as Altavista and Yahoo, allow persons to comb the Web for sites that contain certain categories of information or specified key words. J.S. App. 30a. For example, "a Web user looking for the text of Supreme Court opinions would type the words 'Supreme Court' into a search engine, and then be presented with a list of World Wide Web sites that contain Supreme Court information." *Ibid.* The user could "brows[e] through the information on each site, until the desired material is found." *Ibid.*

There is a wide range of information available through the Internet. Commercial enterprises maintain Web sites to inform potential customers about their goods and services and to solicit purchases. J.S. App. 43a. Nonprofit organizations make information

available on topics of interest to them. *Ibid.* Libraries have placed their card catalogs online. *Id.* at 42a. And chat rooms and newsgroups provide forums for the discussion of thousands of different topics, from Formula 1 racing cars to the Oklahoma City bombing. *Id.* at 42a-43a, 47a-48a. Information that is available on the Internet "is as diverse as human thought." *Id.* at 43a.

2. Congress found that the Internet and other interactive computer services "represent an extraordinary advance in the availability of educational and informational resources," and that they "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." Pub. L. No. 104-104, § 509, 110 Stat. 138 (1996) (to be codified at 47 U.S.C. 230(a)(1) and (3)). But Congress was concerned that without "some basic rules of the road," the corresponding increase in the availability and easy accessibility of sexually explicit materials would harm children. 141 Cong. Rec. S8087 (daily ed. June 9, 1996) (remarks of Sen. Exon). As Senator Exon stated, "[t]he computer is a wonderful device for arranging, storing, and making it relatively easy for anyone to call up information or pictures on any subject they want. That is part of the beauty of the Internet system." *Id.* at S8089. That same technology, however, allows sexually explicit materials, including "the worst, most vile, [and] most perverse pornography," to be "only a few click-click-clicks away from any child." *Id.* at S8088.

Congress was particularly concerned about the accessibility of pornography to children, because children have increasingly become "the computer experts in our Nation's families." 141 Cong. Rec.

S8332 (daily ed. June 14, 1995) (remarks of Sen. Coats). As one of the CDA's most vocal opponents stated, even "[v]ery young children are so adept with computers that they can sit at a key pad in front of a computer screen at home or at school and connect to the outside world through the Internet or some other on-line service." *Id.* at S8341 (remarks of Sen. Leahy). One study presented to Congress estimated that "[o]f the 6.8 million homes with on-line accounts currently available, 35 percent have children under the age of 18." *Id.* at S8333 (remarks of Sen. Coats). Congress was determined to ensure that the "brave new world" of interactive computer services would not be "hostile to the innocence of our children." 142 Cong. Rec. S707 (daily ed. Feb. 1, 1996) (remarks of Sen. Coats).

Congress also learned that the wide availability of pornographic material on the Internet was deterring Internet use by parents who did not want to risk exposing their children to such material. By imposing restrictions on children's access to such material, Congress sought to ensure that interactive computer services such as the Internet would be "a family friendly resource," 142 Cong. Rec. S718 (daily ed. Feb. 1, 1996) (remarks of Sen. Coats), that would be "more frequently used," 141 Cong. Rec. S8339 (daily ed. June 14, 1995) (remarks of Sen. Exon). See *id.* at S8339-S8340 ("We want to make it even bigger, and we want to make it even better, but not for raunchy pornography that would turn most people off.").

b. In order to respond to the increasing availability of sexually explicit materials through computers, Congress enacted Section 502 of the CDA, Pub. L. No. 104-104, 110 Stat. 133. Section 502(1) amends 47 U.S.C. 223(a)(1)(B), which had originally applied only

to telephones, to forbid any person from using a "telecommunications device" such as a modem to "knowingly * * * make[], create[], or solicit[], and * * * initiate[] the transmission of" any communication "which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age." 110 Stat. 133. Section 502(2) adds a new 47 U.S.C. 223(d)(1), which contains two distinct restrictions on the use of "interactive computer services." The first prohibits the knowing use of an interactive computer service "to send to a specific person or persons under 18 years of age" material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 110 Stat. 133-134 (to be codified at 47 U.S.C. 223(d)(1)(A)). The second prohibits the use of an interactive computer service "to display [such material] in a manner available to a person under 18 years of age." 110 Stat. 134 (to be codified at 47 U.S.C. 223(d)(1)(B)). Complementing the three preceding restrictions, Section 502 also prohibits any person from "knowingly permit[ting] any telecommunications facility under [that person's] control to be used for any activity prohibited by" the other prohibitions. 110 Stat. 133, 134 (to be codified at 47 U.S.C. 223(a)(2) and (d)(2)). Persons who violate the CDA's prohibitions are subject to criminal fines and/or imprisonment for not more than two years. Pub. L. No. 104-104, §§ 502(1), 502(2), 110 Stat. 133, 134 (to be codified at 47 U.S.C. 223(a) and 223(d)).

Section 502(2) provides a "defense to a prosecution" for those persons who have restricted access to their communications "by requiring use of a verified credit card, debit account, adult access code, or adult

personal identification number." 110 Stat. 134 (to be codified at 47 U.S.C. 223(e)(5)(B)). A defense to prosecution is also available to those who have "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to indecent or patently offensive communications, "including any method which is feasible under available technology." 110 Stat. 134 (to be codified at 47 U.S.C. 223(e)(5)(A)). [2] By permitting those defenses, Congress sought to keep sexually explicit materials on the Internet "away from children," while at the same time protecting on-line services or information providers who make a good-faith and effective effort to prevent such materials from reaching minors. 142 Cong. Rec. H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Goodlatte).

3. The day the President signed the CDA into law, appellee American Civil Liberties Union, joined by other organizations and some individuals, filed suit in the United District Court for the Eastern District of Pennsylvania against the Attorney General and the Department of Justice to challenge the constitutionality of the CDA's restrictions on indecent and patently offensive communications. J.S. App. 3a. They alleged that those restrictions are facially unconstitutional under the First Amendment and the Due Process Clause of the Fifth Amendment. *Id.* at 2a. District Judge Ronald L. Buckwalter issued a temporary restraining order (TRO) against enforcement of the restrictions on "indecent" communications, but rejected appellees' request for a TRO

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[2] Unless otherwise noted, we refer to the provisions of the CDA as they will ultimately be codified in the United States Code.

against enforcement of the restrictions on "patently offensive" communications. *Id.* at 153a-161a.

Appellee American Library Association, the major online service providers (including America Online, Inc., CompuServe, and Prodigy), and various other organizations, subsequently filed their own facial constitutional challenge to the same provisions. J.S. App. 4a-5a & n.3. The suits were consolidated and heard by a three-judge court pursuant to Section 561(a) of the CDA, 110 Stat. 143, which provides that any civil action challenging the constitutionality of any provision of the CDA "on its face" shall be heard by such a court. J.S. App. 3a, 5a.

After a hearing, the court granted appellees' motion for a preliminary injunction. J.S. App. 1a-149a. For reasons outlined in three separate opinions, the court concluded that appellees had established "a reasonable probability of eventual success in the litigation" by "demonstrating" that the CDA's restrictions on indecent and patently offensive communications are "unconstitutional on their face." *Id.* at 62a.

a. Two members of the court concluded that the CDA's provisions are unconstitutionally vague.

Judge Buckwalter and Judge Sloviter assumed that the "indecent" communications restricted by Section 223(a) are the same as the "patently offensive" communications restricted by Section 223(d)—*i.e.*, that both refer to material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(B). J.S. App. 64a-65a, 92a-93a. Judge Buckwalter viewed that definition as unconstitutionally vague, for two reasons: First, the definition does not expressly restrict the communications that it prohibits to those that are

indecent for "the medium of cyberspace" (*id.* at 95a); and second, the definition does not expressly state whether the relevant community standard is a uniform national standard or a local standard that varies depending on where access to the information is obtained (*id.* at 96a-97a). Judge Sloviter agreed that the terms "indecent" and "patently offensive" are inherently vague. *Id.* at 80a.

Judge Dalzell concluded that indecent and patently offensive mean the same thing under the CDA—speech that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." J.S. App. 110a. That definition, he concluded, is not unconstitutionally vague. *Id.* at 111a-112a. He reasoned that the definition "contains a subset of the elements of obscenity" set forth in *Miller* v. *California*, 413 U.S. 15 (1973), that this Court has upheld the *Miller* standard against vagueness challenges, and that "the omission of parts of that test does not warrant a contrary conclusion." J.S. App. 111a-112a.

b. All three members of the court concluded that the statutory restrictions on indecent and patently offensive communications are unconstitutionally overbroad.

The court found that sexually explicit material "from the modestly titillating to the hardest-core" is available on the Internet, J.S. App. 47a, and all three judges assumed that the government has a compelling interest in protecting minors from at least some sexually explicit material. *Id.* at 72a-73a (Sloviter, J.); *id.* at 87a (Buckwalter, J.); *id.* at 143a (Dalzell, J.). The court nonetheless concluded that the CDA's restrictions on indecent and patently offensive com-

munications impermissibly burden speech that is protected by the First Amendment.

Judge Sloviter premised her conclusion on a determination that "it is either technologically impossible or economically prohibitive" for "many" Internet users to limit their communications to adults. J.S. App. 73a-74a. She specifically found that "no technology exists which allows those posting on the category of newsgroups, mail exploders, or chat rooms to screen for age," *id.* at 74a, and that while "efforts at age verification are technically feasible" on the World Wide Web, "as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in * * * age verification," *ibid.* Judge Sloviter therefore concluded that, for many Internet users, the CDA operates as a "complete ban" on indecent expression of the kind that this Court condemned in *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989). J.S. App. 74a. Judge Buckwalter concurred in Judge Sloviter's opinion, agreeing that "current technology is inadequate to provide a safe harbor to most speakers on the Internet." *Id.* at 84a.

Judge Dalzell concluded that, because of the "special attributes of Internet communication * * *[,] Congress may not regulate indecency on the Internet at all." J.S. App. 131a. Stating that "the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen," *id.* at 141a, Judge Dalzell concluded that the Internet "deserves the broadest possible protection from government-imposed, content-based regulation." *Id.* at 142a.

c. Based on its conclusion that the CDA's restrictions on indecent and patently offensive communications are facially unconstitutional, the three-judge court entered a preliminary injunction that prevents the Attorney General from "enforcing, prosecuting, investigating or reviewing any matter premised upon" those restrictions. J.S. App. 148a-149a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision below effectively invalidates the CDA's restrictions on the dissemination of indecent and patently offensive material to children. The decision therefore imperils the government's ability to protect children from exposure to sexually explicit material that is now widely disseminated on the Internet. Equally significant, the decision leaves many parents who do not want to expose their children to sexually explicit material with little choice but to severely limit or altogether deny their children's access to the Internet.

The court's constitutional rulings are deeply flawed. The CDA is not unconstitutionally vague. This Court's decisions in *Miller* v. *California*, 413 U.S. 15 (1973) and *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374 (1996) (*Denver Area*), rejected vagueness challenges to analogous prohibitions. As those decisions demonstrate, the CDA's restrictions give sufficient warning concerning the core of what they prohibit to satisfy the First Amendment and the Due Process Clause.

The district court also incorrectly held the CDA's indecency restrictions facially invalid based on a determination that they unconstitutionally interfere with adult-to-adult communication in a substantial

number of cases. Two of the three primary restrictions at issue here are clearly constitutional and should not have been enjoined in any respect. They prohibit the transmission of indecent or patently offensive material to a particular person or persons knowing that the recipient is under age 18, and do not significantly interfere with adult-to-adult communication at all. The third restriction prohibits the display of patently offensive material in a manner "available" to children, and raises more difficult questions. But the CDA provides a defense to prosecution for persons who take reasonably effective steps to prevent indecent material from reaching children, such as by requiring verified credit cards or adult IDs—something many commercial content providers already do. The third prohibition is therefore facially constitutional as well.

Even if one or more of the CDA's restrictions were unconstitutional in some of their applications, it would not justify an injunction barring enforcement of all of those restrictions in all respects. The operative severability clause, 47 U.S.C. 608, directs courts to preserve all provisions and all applications of the CDA that are constitutional.

Because the decision below effectively invalidates provisions of an important Act of Congress, and because that decision is based on a faulty constitutional analysis, this Court should note probable jurisdiction and set the case for plenary review.

1. The provisions of the CDA at issue on this appeal—47 U.S.C. 223(a) and (d)—prohibit the use of telecommunication devices and interactive computer services to disseminate or display sexually explicit material to children under the age of 18. Section 223(a) refers to the sexually explicit material that is

covered by its prohibitions as "communication[s]" that are "indecent," while Section 223(d) refers to the category of covered material as "communication[s] that in context, depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." As Judge Dalzell concluded, however, the two descriptions are interchangeable. "[T]he use of 'indecent' in § 223(a) is shorthand for the longer description in § 223(d). Conversely, the longer description in § 223(d) is itself the definition of 'indecent' speech." J.S. App. 110a; see S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 188 (1996) ("The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502) has the same meaning as established in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) and *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989).").

Sexually explicit speech that is patently offensive is not without constitutional protection. *Sable*, 492 U.S. at 126. Nonetheless, because "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language [or images]," *Pacifica*, 438 U.S. at 743 n.18 (opinion of Stevens, J.), and because indecent communication has the capacity to harm children in ways that cannot readily be undone, *Pacifica*, 438 U.S. at 749, this Court has never held that such speech is immune from governmental regulation. At the very least, the regulation of sexually explicit, patently offensive material is constitutional when it is narrowly tailored to further a compelling interest. *Sable*, 492 U.S. at 126.

The prohibitions at issue on this appeal satisfy that standard. This Court has repeatedly held that the

government has a compelling interest in protecting children from exposure to patently offensive, sexually explicit material. *Denver Area*, 116 S. Ct. at 2387 (Breyer, J.); *id.* at 2416 (Kennedy, J., concurring in part, dissenting in part); *id.* at 2429 (Thomas, J., concurring in part, dissenting in part); *Sable*, 492 U.S. at 126; *Ginsburg* v. *New York*, 390 U.S. 629, 639-640 (1968); *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982). That interest has particular force in the present context. Patently offensive material is widely disseminated on the Internet, and computer-literate children—of whom there are many—can easily find and retrieve it. Moreover, unless steps are taken to restrict the availability of such material to children, many parents will be deterred from permitting their children to use the Internet; indeed, many parents will be deterred from bringing the Internet into their homes at all. The government therefore has two especially compelling interests at stake in this case—furthering the First Amendment interests of all parents and children in using what has become an unparalleled tool for communicating and retrieving information, while at the same time protecting children against patently offensive, sexually explicit material.

The prohibitions at issue here are narrowly tailored to further the government's compelling interests. They do not flatly ban the dissemination of all patently offensive communications through telecommunications devices or interactive computer services. Instead, they permit adults to disseminate patently offensive material to other adults, as long as they require verified credit cards or adult IDs, or take other reasonable, appropriate, and effective steps to prevent the material from reaching children. 47

U.S.C. 223(e)(5). The provisions at issue here are therefore facially constitutional.

The court below assumed that the government has a compelling interest in protecting minors from sexually explicit material. J.S. App. 72a-73a (Sloviter, J.); *id.* at 87a (Buckwalter, J.); *id.* at 143a (Dalzell, J.). The court also found that sexually explicit material, "from the modestly titillating to the hardest-core," is available on the Internet. *Id.* at 47a. It nonetheless held that the restrictions at issue here are facially unconstitutional because they are impermissibly vague and overbroad. As we explain in points 2 and 3, respectively, those rulings are seriously flawed.

2. The CDA's definition of patently offensive materials is similar to one of the elements that this Court used in *Miller* v. *California*, *supra*, to define material that States may constitutionally regulate as obscenity. See *Miller*, 413 U.S. at 25. Because *Miller* held that the standard it imposed is not unconstitutionally vague, *id.* at 27 & n.10, *Miller* strongly supports the conclusion that the CDA's definition of patently offensive materials is not unconstitutionally vague. See also *Ginsburg*, 390 U.S. at 632-633, 643 (rejecting vagueness challenge to prohibition on the sale of sexually explicit pictures to minors that included as one element that the material be "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors").

The district court's vagueness holding is also in serious tension with this Court's recent decision in *Denver Area*. In that case, a four-Justice plurality expressly rejected a vagueness challenge to a statutory provision giving cable operators a right to prohibit programming on leased channels "that the cable

operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 116 S. Ct. at 2381, 2389-2390. Three other Justices voted to uphold the constitutionality of that provision, thereby implicitly rejecting the vagueness challenge. *Id.* at 2419 (opinion of Thomas, J., concurring in part, dissenting in part). Because the CDA's definition of indecency is almost identical to the definition upheld against a vagueness challenge in *Denver Area*, that decision reinforces the conclusion that the CDA's restrictions are not unconstitutionally vague.

The *Denver Area* plurality's discussion of the issue demonstrates why the CDA's definition of indecency is not unconstitutionally vague. The plurality explained that the provision giving cable operators a right to bar patently offensive communications "uses language similar to language previously used by this Court [in *Miller*] for roughly similar purposes," and that it aims at "pictures of oral sex, bestiality, and rape * * * and not at scientific or educational programs (at least unless done with a highly unusual lack of concern for viewer reaction)." 116 S. Ct. at 2389-2390. The plurality also noted that "what is 'patently offensive' depends on context (the kind of program on which it appears)" and "degree (not 'an occasional expletive')." *Id.* at 2390 (quoting *Pacifica*, 438 U.S. at 748, 750). Those guides to meaning are sufficient to give fair warning concerning the core of what is and is not prohibited. See also S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 189 (1996) (determination whether material is patently offensive "cannot be made without a consideration of the context of the description or depiction at issue"; "[m]aterial with

serious redeeming value" that "is quite obviously intended to edify and educate, not to offend," is not patently offensive). While those guides to interpretation do not eliminate all uncertainty, perfect clarity is neither possible nor constitutionally required. *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) ("[d]ue process does not require 'impossible standards' of clarity"); *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972) ("[c]ondemned to the use of words, we can never expect mathematical certainty from our language").

Consistent with this Court's decisions in *Miller* and *Denver Area*, the three-judge court in *Shea* v. *Reno*, 930 F. Supp. 916, 931-934 (S.D.N.Y. 1996), held that the CDA's definition of indecency is not unconstitutionally vague. The district court in this case erred in reaching a contrary conclusion.

3. The court below also erred in concluding that the CDA's indecency restrictions are unconstitutionally overbroad. The CDA contains three independent prohibitions against the dissemination or display of patently offensive communications, each of which requires separate analysis.

Section 223(a)(1)(B) forbids any person from using a "telecommunications device" to "knowingly * * * make[], create[], or solicit[], and * * * initiate[] the transmission of" any communication "which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age." Section 223(d)(1)(A) prohibits the knowing use of an "interactive computer service to send to a specific person or persons under 18 years of age" material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." And

Section 223(d)(1)(B) prohibits the use of an interactive computer service "to display [such material] in a manner available to a person under 18 years of age."

a. The linchpin of the district court's analysis was its determination that it is either technologically impossible or economically infeasible for many Internet users to limit their communications to adults. Based on that premise, the court concluded that the CDA's restrictions effectively create a total ban on indecent communication of the kind that this Court condemned in *Sable*. J.S. App. 73a-74a; *id.* at 83a-84a (Buckwalter, J.).

That concern, however, is not significantly implicated by Section 223(a)(1)(B), which prohibits the use of a "telecommunications device" to "initiate[] the transmission of any * * * communication which is * * * indecent, *knowing* that the recipient of the communication is under 18 years of age." 47 U.S.C. 223 (a)(1)(B) (emphasis added). That prohibition applies only in situations in which a person transmits indecent material to another person, knowing that person is under 18. For example, it would prohibit one-to-one communications via telephone, fax machine, or e-mail, in which the initiator of the indecent communication knows that the particular recipient of the message is under 18. To comply with Section 223(a)(1)(B), persons need not refrain from communicating indecent material to adults; they need only refrain from disseminating such material to persons they know to be under 18. Section 223(a)(1)(B) is therefore narrowly tailored to meet the government's compelling interest in shielding children from indecent material, and the district court erred in enjoining its enforcement.

b. That same analysis applies to Section 223(d)(1)(A), which prohibits use of an "interactive computer service to send [patently offensive material] to a specific person or persons under 18 years of age." Like Section 223(a)(1)(B), Section 223(d)(1)(A) applies to situations in which a person sends indecent material to someone he knows to be under 18. Like Section 223(a)(1)(B), it does not substantially interfere with adult-to-adult communications. For that reason, the district court likewise erred in enjoining its enforcement.[3]

c. Section 223(d)(1)(B), which prohibits the use of an interactive computer service to display patently offensive material "in a manner available" to a person under 18, raises more difficult questions. But the Act provides a defense to prosecution when the user restricts access through a verified credit card or an adult ID, 47 U.S.C. 223(e)(5)(B), or otherwise takes reasonable, appropriate, and effective steps to prevent

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[3] While there is substantial overlap between Section 223(a)(1) and Section 223(d)(1)(A), there are also some differences in coverage. The former uses the term "telecommunications device." The latter uses the term "interactive computer service," which is defined elsewhere as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. 230(e)(2). Section 223(a)(1) therefore includes the use of a telephone or fax machine, while Section 223(d)(1)(A) does not. On the other hand, the latter provision covers the use of interactive computers that are directly linked to other computers, while the former does not. Both cover the use of computers that are linked through modems. See J.S. App. 6a n.5.

children from obtaining access to the material, 47 U.S.C. 223(e)(5)(A). The district court determined that the statutory defenses are not available as a practical matter to most content providers, rendering Section 223(d)(1)(B) facially invalid. J.S. App. 78a (Sloviter, J); *id.* at 84a (Buckwalter, J). The statutory defenses, however, are available in a wide range of situations, and the CDA leaves open a number of avenues for adult-to-adult communication.

i. For example, those who post patently offensive information on their Web sites for commercial purposes can take advantage of the statutory defenses. The court below found that current technology permits the operator of a Web site to screen visitors by requesting a credit card number or adult ID. J.S. App. 51a. Many commercial sites that display sexually explicit content already use credit card and other adult verification devices to screen for age. *Id.* at 135a (Dalzell, J.). And there is nothing inequitable about requiring those commercial Web site operators who profit from patently offensive material, but do not presently use credit card or adult ID screening devices, to shoulder the modest burdens associated with their use. See *Denver Area*, 116 S. Ct. at 2393 (opinion of Breyer, J.) (suggesting that cost burdens associated with television lock boxes could be imposed on cable system operators). Thus, as the three-judge district court in *Shea* concluded, the credit card and adult ID safe harbor "serves as an adequate defense for at least certain commercial providers of Web content—specifically, those who primarily make Web content available for 'purchase' or, put another way, those who charge Web users to gain access to, and view, their content." 930 F. Supp. at 942-943.

ii. Operators of noncommercial Web sites can also take advantage of the statutory defenses. The court concluded that there is no practical way for such operators to do so. But the findings underlying that determination fail to discuss in any meaningful way the evidence that both commercial and noncommercial Web content providers may use "adult verification services," such as "AdultCheck." See J.S. App. 55a-56a.

Verification services, which maintain their own Web sites, charge persons a nominal yearly fee (*e.g.*, $9.95) for an adult identification number that can be used to gain access to Web sites registered with the service. When a user goes to a registered site, he enters his adult ID number. If the number is valid, the user is automatically admitted to the site; if the number is invalid, entry to the site is denied. See generally Schmidt Exh's. 6 and 8.

Verification services ordinarily do not charge the operator of a Web site a fee, and they will help set up the means for password entry and verify the IDs themselves. See generally Schmidt Exh's. 6 and 8; see also *Shea*, 930 F. Supp. at 934. Because noncommercial entities that post patently offensive material on their Web sites can use adult verification services to prevent children from obtaining access to their sites, Section 223(d)(1)(B) is constitutional as applied to them.

iii. Mail exploder and chat room users who want to disseminate patently offensive material can use a closed mailing list or chat room that has rules limiting participation to adults; if no such list or chat room is in existence that adequately meets their needs, participants can start their own list or chat room and then screen for age (*e.g.* by setting up their own adult

identification system). Also, newsgroup users who wish to exchange patently offensive material could set up their own list of servers and screen for age. See *Shea*, 930 F. Supp. at 947-948 (discussing the above alternatives).

Users of all three forms of communication could also post messages in the relevant mailing list, newsgroup, or chat room directing participants to a Web site that is screened for age to view a particular patently offensive message. Anyone visiting the site could then respond to that message by e-mail. Furthermore, users of all three forms of communication always have the option to tone down their communication so that it does not contain material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. 223(d)(1)(B).

In the short run, users of mail exploders, newsgroups, and chat rooms who want to disseminate patently offensive material may have to incur some additional costs or burdens, or switch to an alternative method of communicating that material, over the Internet or otherwise. See *Shea*, 930 F. Supp. at 947-948. But Congress is not precluded from imposing some costs and burdens on those who disseminate patently offensive material to ensure that such material does not become widely available to children. That is particularly true when, as here, there is no other effective way to vindicate the government's compelling interests in protecting children from the harmful effects of such material and ensuring that parents are not deterred from making the Internet available to their families. And whatever the dimensions of a person's First Amendment right to use

interactive computer services to transmit patently offensive materials, it cannot include an unqualified right to do so through every possible mode of communication made possible by such services. See *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

d. Even if Section 223(d)(1)(B) were unconstitutional in some of its applications, the district court erred in enjoining enforcement of all three primary restrictions in all their applications. The CDA was passed as an amendment to the Communications Act of 1934, which provides that "[i]f any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. 608. Under that severability clause, an infirmity in Section 223(d)(1)(B)'s prohibition against the display of patently offensive material should not affect the other two primary provisions, which contain distinct prohibitions against the knowing initiation of communication or transmission of such material to children under age 18. See *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2070 (1996) (relying on severability clause in the underlying Act to which the challenged provisions were added). Compare *Denver Area*, 116 S. Ct. at 2397 ("we can find no reason why, in light of Congress's basic objective (the protection of children), Congress would have preferred no provisions at all to [one] provision standing by itself").

The severability clause is significant in another respect. Under that clause, a determination that Section 223(d)(1)(B) is unconstitutional as applied to a particular class of persons or set of circumstances should not affect the constitutionality of applying

that prohibition to other classes of persons or other sets of circumstances. See *Wyoming* v. *Oklahoma*, 502 U.S. 437, 460-461 & n.14 (1992). To take the clearest example, even assuming that Section 223(d)(1)(B) would be unconstitutional as applied to certain types of content providers, there would be no basis for invalidating Section 223(d)(1)(B) as applied to commercial Web sites. See also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985) (unless there are "countervailing considerations," a statute should be "declared invalid only to the extent it reaches too far, but otherwise left intact"); compare *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1019 & n.26 (1995) (refusing to preserve certain applications after finding an Act of Congress unconstitutionally overbroad, where Congress had sent conflicting signals as to where the new line should be drawn, each of the new lines would raise independent constitutional concerns, and there was no severability clause).

Upholding the application of Section 223(d)(1)(B) to commercial Web sites would afford significant protection to children. While commercial pornographers on the Web screen some of their material for age through credit card or adult IDs, many post sexually explicit "teasers" that can be viewed without charge. See, *e.g.*, Schmidt Exhs. 20, 25, 26, 27, 44. As a result, by browsing the Web sites of commercial pornographers, children can view an enormous number of sexually explicit pictures without charge. If Section 223(d)(1)(B) were upheld as applied to commercial Web sites, most commercial pornographers would quickly end their practice of posting sexually explicit material that can be viewed without a credit card or adult ID.

e. Other methods of restricting access by children to patently offensive communications may also be available or be developed in the future. For example, the technology already exists for "tagging" communications in all major Internet applications. *Shea*, *supra*, 930 F. Supp. at 932-933. One way for such a system to operate would be for there to be a consensus on a tag (an identifying code) that indicates that material is being marked for compliance with the CDA's indecency restrictions (similar to the R rating for movies). Major browsers could then be programmed to recognize the tag. Such browsing mechanisms may become broadly available and operative—*e.g.* devices could be developed that would automatically block covered material unless it is unblocked by parents, or that would enable parents to block the tagged material with the click of a mouse or in some other easy and understandable way.

In light of the rapid development and innovative capabilities of all components of the Internet industry, there is every reason to expect that technological steps will occur swiftly if the CDA's indecency restrictions are upheld. In the meantime, Congress decided that it is better to place some burdens and costs on those who disseminate or display patently offensive material than it is to leave children wholly unprotected. That judgment by Congress, in the context of a new and rapidly changing technology, is constitutional.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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